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IN THE UNITED STATES DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

UNITED STATES OF AMERICA)	Case No. CR-03-40210-SBA
)	
Plaintiff,)	
)	UNITED STATES' OPPOSITION TO
v.)	DEFENDANT' S MOTION FOR
)	<u>JAMES HEARING</u>
MOHAMMAD YOUSUF CHAUDHRY,)	
and ALI H. KAHN,)	Hearing: September 11, 2007
)	Time: 8:30 AM
Defendants.)	Courtroom Number 3

INTRODUCTION

Defendant Ali Kahn ("Kahn") seeks an order requiring a pretrial hearing at which the United States must designate all co-conspirator statements it intends to introduce under Fed.R.Evid. 801(d)(2)(E) and prove the admissibility of such statements. In support of his motion he asserts that it is unlikely that the government will be able to make a showing that Kahn participated in the alleged conspiracy. Def. Khan Memo. 7.

Kahn's claim is unfounded. The government is prepared to present ample evidence that Kahn conspired with Mohammed Yousef Chaudhry ("Chaudhry") to structure transactions in order avoid financial reporting requirements and allow defendant Chaudhry to underreport his income on his federal tax returns the income from two of his businesses – RT Computers ("RT") and Alternative Energy Systems ("AES"), in violation of 31 U.S.C. § 5324, Structuring Transactions to Evade Reporting Requirements.

1 BACKGROUND

2 The United States anticipates that the evidence introduced at trial will show that the Kahn
3 and Chaudhry were involved in a conspiracy to structure transactions to avoid financial reporting
4 requirements and that one of the aims of this conspiracy was to allow Chaudhry to underreport on
5 his federal tax returns the income from two of his businesses – RT Computers (“RT”) and
6 Alternative Energy Systems (“AES”). The evidence introduced in trial will prove the following
7 facts.

8 A. Kahn participated in Chaudhry’s check cashing scheme

9 Kahn was an employee of Chaudhry’s who assisted Chaudhry with structuring his business
10 transactions by cashing multiple checks in amounts less than \$10,000. These checks were not
11 cashed at banks but were brought by the defendants to local check cashers. Some of the check
12 cashers were corrupt and agreed with the defendants that they would not file Currency
13 Transaction Reports (“CTR’s”) with the IRS.¹ Kahn covered up Chaudhry’s scheme by filing
14 false Currency Transaction Reports (“CTR’s”) on behalf of RT and AES. Kahn participated in
15 cashing over 150 checks, and Chaudhry personally cashed many more. Only a representative
16 sample of these checks was charged in the indictment; however, all of the cashed checks were
17 part of the same overall course of conduct.

18 B. Kahn participated in the business of selling counterfeit or stolen software

19 RT and AES were in the business of selling counterfeit or stolen software. The
20 businesses operated by making cash purchases of large pallets of common software such as
21 Microsoft Office. The software was typically stolen or had been designated for a specific use,
22 such as the educational market. Software designated for such specific markets was sold by
23 Microsoft at a discount price. Employees at RT and AES would remove the seals and stickers
24 from the educational-use software and replace them with general-use seals and stickers, enabling
25 RT and AES to sell software that was obtained for the discounted educational-use price to
26

27 ¹ The currency transaction reporting requirement that the defendants sought to
28 evade by structuring their transactions was the filing of CTR’s with the IRS. CTR’s must be
filed for all cash transactions over \$10,000.

1 retailers at the increased general-use price. Stolen software was similarly repackaged to appear
2 as if it had been legitimately obtained. In addition to assisting Chaudhry with structuring check
3 cashing to avoid financial reporting requirements, Kahn also participated in delivering the stolen
4 software to RT's and AES' customers.

5 Kahn claims that he was not aware of defendant Chaudhry's illegal business dealings and
6 was only doing what he was told as an employee of the companies. However, witnesses will
7 testify to the pervasiveness and obviousness of Chaudhry's illegal conduct, and Kahn's many-
8 faceted participation in that conduct.

9 DISCUSSION

10 I

11 JAMES HEARING WOULD UNNECESSARILY LENGTHEN THIS MATTER

12 Evidence of out-of-court statements of co-conspirators is deemed non-hearsay by Federal
13 Rule of Evidence 801(d)(2)(E). As Kahn correctly notes, whether the predicate for the
14 admission of such an out-of-court statement exists is a matter for the Court to decide.

15 Although the United States cannot rely solely upon evidence of out-of-court statements to
16 establish the existence of the conspiracy, "co-conspirator hearsay statements may be used to
17 prove the preliminary facts of the conspiracy and the defendant's involvement in it. . . ."

18 United States v. Tamez, 941 F.2d 770, 774-5 (9th Cir. 1991).

19 "[E]vidence [of the existence of the conspiracy] need not . . . be introduced normally prior
20 to the admission of the co-conspirator's declaration. The courts consistently hold that the
21 hearsay declaration 'may be admitted conditionally, at the trial judge's discretion, subject to
22 the prosecution establishing its later presentation a proper basis for admitting the questioned
23 evidence." P. Marcus, *Prosecution and Defense Of Criminal Conspiracy Cases*, Section
24 5.05[3] (1995). United States v. Watkins, 600 F.2d 201 (9th Cir.), cert. denied, 444 U.S. 871
25 (1979) (holding that the trial court, "may admit the challenged statements conditionally, subject
26 to a later motion to strike").

27 Moreover, although some courts have conducted pretrial hearings to determine if co-
28 conspirators' statements should be admitted, a pretrial hearing is not mandatory and it is the

1 rare case that warrants such an extraordinary procedure. See Def. Khan Memo 5.

2 Although there might conceivably be instances where such a hearing would be
3 helpful, we think that as a general rule such a hearing, . . . would unnecessarily
4 lengthen the proceedings. Evidentiary questions are grist for the mill of district
5 judges and, except in rare instances, can be handled competently in the trial context.

6 United States v. Medina, 761 F.2d 12, 17 (1st Cir. 1985).

7 Whether the circumstances warrant such a hearing "is a matter solely within the discretion
8 of the district court." Id. at 17. Considering the circumstances presented in Medina, the First
9 Circuit concluded that "the record shows that such a hearing would have been a total waste of
10 time and effort." 761 F.2d 17.

11 The present case is not the "rare instance" that warrants novel pre-trial proceedings
12 concerning the proof of conspiracy the United States will present. The United States' ability
13 to present evidence of a conspiracy sufficient to support a related finding is not seriously in
14 doubt, Kahn' s claim to the contrary notwithstanding. There is ample evidence that would
15 support a finding that a conspiracy existed. Proffered evidence will establish the existence of
16 the conspiracy, and Kahn' s connection to it. Testimony and documentary evidence will
17 establish Kahn' s connection to the check cashing scheme and business of selling illegal or
18 counterfeit software. Witness Testimony will further establish the pervasiveness and
19 obviousness of the illegal conduct in which Kahn was a material participant.

20 In sum, there is ample evidence to establish that the alleged conspiracy existed and that
21 Kahn was a member of the conspiracy.

22 II

23 POST-ARREST STATEMENTS 24 IN FURTHERANCE OF CONSPIRACY ARE ADMISSIBLE

25 ___Defendant Khan correctly asserts that co-conspirator statements made during the course of
26 a conspiracy are admissible against co-conspirators. See Def. Khan Memo 7, lines 15-16.
27 Defendant Khan, however, seeks to preclude the admission of his co-conspirator' s post-arrest
28 statements for the reason that an arrest ends the conspiracy. Defendant Khan also asserts that
because a co-conspirator' s arrest ends the conspiracy, no post-arrest co-conspirator statements
can be in furtherance of the then terminated conspiracy and for that reason are inadmissible.

1 See Def. Khan Memo 7, lines 16-17. This assertion is not supported by the cited authority,
2 United States v. Smith, 623 F.2d 627 (9th Cir. 1980). The Smith Court merely affirms the
3 general proposition that statements made after the termination of a conspiracy are inadmissible
4 and nowhere in that decision does the Court state that an arrest ends a conspiracy. Id. at 631.

5 The Ninth Circuit has held that a co-conspirator's post-arrest statement to an undercover
6 agent is admissible against a co-conspirator when the statement is in furtherance of the
7 conspiracy. United States v. Sanchez-Rosales, 216 F.3d 1085 (9th Cir. 2000). The Ninth Circuit
8 further holds that co-conspirator statements which conceal or impede an investigation are in
9 furtherance of the conspiracy are therefore admissible against co-conspirators. Hawkins v.
10 Bunnell, 16 Fed. Appx. 656, 658 (9th Cir. 2001). Accordingly, Chaudhry's post-arrest and
11 incarcerated statements, which were taped by prison officials, are admissible against Khan for
12 the reason that Chaudhry's statements are in furtherance of the conspiracy as they attempt to
13 conceal the conspiracy from his spouse.

14 CONCLUSION

15 The United States is prepared to present ample evidence of the existence of the conspiracy
16 charged, and Kahn's participation in it. There is no need for novel pretrial orders or
17 proceedings. The usual safeguards are more than sufficient to avoid the improper admission of
18 co-conspirators' statements. Kahn's motion should be denied.

19 Respectfully submitted,

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21 United States Attorney

22
23 /s/ Thomas Moore
24 THOMAS MOORE
25 Assistant United States Attorney
26 Tax Division
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